

FILED

DEC 13 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO, TEXAS

WACO DIVISION

JAMES BRIAN CURZ,	\$	
MOVANT-DEFENDANT,	\$	CIVIL NO. W-04-CA-333
VS,	\$	CRIM. NO. W-99-CR-013
UNITED STATES OF AMERICA,	\$	
RESPONDENT.	\$	

DEFENDANT'S NOTICE OF APPEAL AND LEAVE FOR C.O.A.

COMES FORTH, MOVANT-DEFENDANT James Brian Cruz, with his timely notice of appeal pursuant to the FRAP Rule 4(a) and 10(a) and leave for "certificate of appealability". Defendant will show this Honorable Court as follows:

Service of Response:

Defendant seeks to proceed with the §2255 Rule 5(a) failure of the government to serve a response to movant-defendant and allow time to prepare a reply-response to the government's response. The Court seems to have ignored the prayers and proceeded to deny every effort made by pro se litigant to obtain a due response and a fair opportunity to file a reply. Defendant seeks leave to proceed with this issue on appeal. FRAP Rule 4(a)(1)(A).

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Ineffective Assistance of Counsel:

The District Court on its initial consideration pursuant to §2255 Rule 4(b) allowed defendant to proceed with the ineffective assistance of counsel issues. The government was directed to file a response [and provide pro se plaintiff with copy] on, as extended by the court, by February 2005. Defendant Cruz has waited for said response for in excess of ten (10) months and petitioned the Court to compel the government to response. The Court has ignored pro se pleading and on the judgment order sought to be appealed, the Court has ruled to have taken into consideration the Government's response. Despite defendant's numerous motions seeking to obtain a copy of the 'alleged government's response', none has been provided.

IAC Issues:

Defendant Cruz properly preserved at least two issues of denial of Sixth Amendment Right to effective assistance of counsel on trial and mainly on direct appeal. Defendant's sentence was enhanced for acts not presented to the jury for proof beyond reasonable doubt nor charged in the indictment for Apprendi purpose. Although the issues properly preserved during trial and sentencing; appellate counsel rebuffed instructions to raise and preserve the firearm and alleged carjacking enhancements that increased defendant's sentence. Defendant has attempted to properly raise this issues on his §2255 but the district court has prevented pro se defendant from properly prosecute this action under §2255.

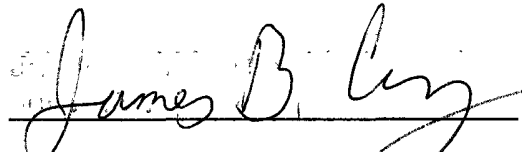
Defendant Cruz asserts that had the government had complied with §2255 Rule 5(a) and served the pro se litigant, defendant would have had time to properly reply and clear conflictive disputes. On the other hand, the Court should have allowed pro se litigant the fair opportunity to present his case in court by complying with all the prescribed rules under §2255.

C/O/A:

Defendant Cruz asserts that §2255 is the proper venue to raise his ineffective assistance of counsel claim at district court level and that the Government was compelled per order of the court to comply with §2255 Rule 5(a) with service of the alleged response due on February 2005. Defendant Cruz preserved this claim per his §2255 Rule 8(a) evidentiary hearing request and his Rule 59(e) motion to alter or amend judgment order #432 as to #426. The Court has stricken both motions as frivolous and ignored the pleading to be provided with a copy of the government's response for review.

Wherefore, defendant Cruz hereby seeks leave to proceed with his COA under in forma pauperis on appeal and leave to proceed with the issues listed above to the Fifth Circuit Court of Appeals.

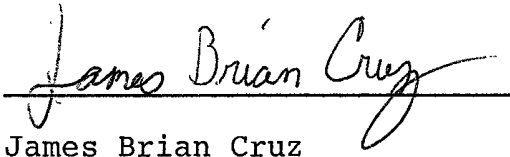
EXECUTED this 7th. day of December 2005


James Brian Cruz, pro se

xc. files

SWORN DECLARATION

I **JAMES BRIAN CRUZ**, hereby declare the foregoing material facts to be true and correct to the best of my knowledge and understanding. I declare to have carefully read the contents of said pleading and do approve and sign under penalty of perjury. 28 USC §1746.


James Brian Cruz

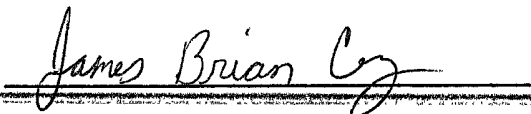
CERTIFICATE OF SERVICE

I declare to have served below listed parties:

UNITED STATES ATTORNEY'S OFFICE
AUSA MARK L. FRAZIER
800 FRANKLIN, SUITE 280
WACO, TEXAS 76701

CLERK OF THE COURT
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
800 FRANKLIN AVENUE ROOM 380
WACO, TEXAS 76701

RESPECTFULLY PRESENTED this 7th DECEMBER 2005 and on this day I declare to have served the Clerk of the Court with an original and two copies via first class mail, postage prepaid. I further declare to have placed the foregoing in the "prison legal mail box" for delivery, on this day.



xc files

James Brian Cruz pro se
Reg. No. 03088-180
United States Penitentiary
P.O. Box 2099 Unit C-333
Pollock, Louisiana 71467

United States District Court

Western District of Texas

Waco Division

William G. Putnicki
Clerk of Court

800 Franklin, Room 380
Waco, Texas 76701

December 14, 2005

Honorable Charles R. Fulbruge III, Clerk
United States Court of Appeals, Fifth Circuit
P. O. Box 610160
Houston, TX 77208

RE: JAMES BRIAN CRUZ VS USA

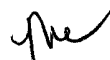
W-99-CR-013

W-04-CA-333

In connection with this appeal, the following documents are transmitted. Please acknowledge receipt on the enclosed copy of this letter.

- X Certified copy of the Notice of Appeal filed 12/13/05 and docket entries.
- Certified copy of Notice of Cross-Appeal and docket entries.
- Judgment and Commitment Order has not been entered.
- Record on appeal consisting of _ volume(s) of the record, _ volume(s) of the transcript and _ volume(s) of exhibits-depositions
- Supplemental record, including docket entries.
- Copy of CJA-20 appointing counsel.
- X Other: See Appeal 01-50642
- In regard to the Notice of Appeal, the following additional information is furnished:
- X The Court of Appeals docket fee HAS HAS NOT XXX been paid.
- This case is proceeding In Forma Pauperis.
- Although the Court of Appeals docket fee was not paid at the time of the Notice of Appeal was was filed, it was paid on
- X District Judge/Magistrate entering this judgment is Walter S. Smith, Jr.
- Court Reporter assigned to this case is
- If criminal case, names and numbers of other defendants are:
- This case was decided without a hearing. There will be no transcript.

Sincerely,



Mary Cunningham
Deputy Clerk

Copies To: Attorneys of record
U.S. District Judge